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In the Matter of)	
)	
Adjustment of the Rates for)	Docket No. 96-6
Noncommercial Educational)	CARP NCBRA
Broadcasting Compulsory License)	

REPLY OF THE PUBLIC BROADCASTERS
TO ASCAP'S OPPOSITION TO THE PUBLIC BROADCASTERS'
MOTION TO COMPEL DISCOVERY FROM ASCAP
OR TO STRIKE CERTAIN TESTIMONY AND EXHIBITS

PBS, NPR, and the stations on whose behalf they seek rates in this proceeding (the "Public Broadcasters") hereby reply to ASCAP's Opposition ("ASCAP's Opposition") to the Public Broadcasters' Motion to Compel Discovery from ASCAP or to Strike Certain Testimony and Exhibits ("the Public Broadcasters' Motion"). As set forth fully in the Public Broadcasters' Motion, ASCAP has refused to provide documents underlying specific factual assertions at the heart of its direct case. As discussed below, ASCAP's Opposition does not justify its failure to produce documents, many of which ASCAP concedes exist.

Discovery Pertaining to the Testimony of
Dr. Peter M. Boyle

The Public Broadcasters have moved to compel the production of music data which underlie the testimony of Dr.

Boyle. Dr. Boyle's testimony is of fundamental importance in this proceeding. ASCAP's claim in its responding papers that it has already made a sufficient production with respect to the data underlying Dr. Boyle's music analysis is insupportable.

Most notably, ASCAP's production is dramatically at odds with the music-related production of the Public Broadcasters and BMI. In response to ASCAP's very own document requests, the Public Broadcasters have produced, in electronic form, every "cue sheet" underlying their statements concerning music use on public television. Similarly, BMI claims to have produced, in computerized form, detailed "cue sheet" and programming data, including "all the music content data of every identified performance of every program on over 300 stations listed by call letter and air date for a five-year period." See Broadcast Music, Inc.'s Opposition to PBS/NPR/CPB's Motion to Compel or Strike, pp. 7-8. In stark contrast, ASCAP has not produced a single cue sheet or similar electronic datum underlying Dr. Boyle's testimony. Remarkably, ASCAP contends that it is required to produce virtually no documentation underlying its music use studies.

ASCAP's position is clearly insupportable in light of the combined facts that (i) ASCAP indisputably possesses

data similar to those produced by BMI and the Public Broadcasters and (ii) such data were relied upon by Dr. Boyle. When one considers further the central nature of music data to this proceeding, one can only conclude that ASCAP believes it has something to hide.

ASCAP admits that it possesses data of the type produced by BMI and the Public Broadcasters, specifically noting that ASCAP maintains a "program detail" database which contains the "cue sheet" and programming information obtained by ASCAP as a result of its survey of music use by television and radio broadcasters. See ASCAP's Opposition at 2-3. ASCAP has, however, refused to produce any of this information on the ground that Dr. Boyle's analysis is based solely upon "credits" calculated by ASCAP, not underlying data. Accordingly, ASCAP has produced nothing more than tables containing subtotals of ASCAP credits by "credit type" (and three spreadsheets purporting to describe certain fields contained in the subtotal tables).

ASCAP's position is untenable. It avoids the obvious fact that the "credits" purportedly relied upon by Dr. Boyle are derived from the underlying "cue sheet" and programming information retained by ASCAP in computerized form. In fact, ASCAP concedes in its Opposition that the "credits" relied upon by Dr. Boyle are directly calculated

from the program and cue information collected as the result of ASCAP's surveys, subject to numerous adjustments performed pursuant to rules devised by ASCAP. See ASCAP's Opposition at 2-3. It cannot be disputed that these credits are merely ASCAP's "interpretation" of the underlying data it collects. As both BMI and the Public Broadcasters have done, ASCAP should be compelled to produce data which underlie Dr. Boyle's "interpretation" of music use.

ASCAP's attempt to characterize prior holdings of the Copyright Office and the CARP as not requiring the production of evidence sufficient to verify the accuracy of the bottom-line figures is also erroneous. Directly contrary to ASCAP's argument, see ASCAP's Opposition at 7 n.3, the Copyright Office has time and again ordered parties to CARP proceedings to produce documents, or make databases available for inspection and copying, to allow parties to verify "bottom-line figures offered by witnesses." Order in Docket No. 96-3 CARP SRA at 5 (February 7, 1997). See also Order in Docket No. 96-5 CARP DSTRA at 17, 18 (November 27, 1996); Order in Docket No. 94-3 CARP-CD 90-92 at 2 (October 30, 1995).

ASCAP's claim that the Order in Docket No. 96-3 CARP SRA at 5 (February 7, 1997) "supports denial" of the Public Broadcasters' request, see ASCAP's Opposition at 8,

is incorrect for two reasons. First, the paragraph from which ASCAP quotes in fact states that "[a]s the Library has stated in prior proceedings, bottom-line figures offered by witnesses must be verified." Id. Moreover, the language upon which ASCAP relies for its assertion that production is not required was specifically directed to "data that comes from outside sources . . . often created by third parties who have no connection whatsoever to a CARP proceeding." Id. (emphasis added). In contrast, the underlying data sought by the Public Broadcasters at issue here was obtained as a result of ASCAP's own surveys and is in ASCAP's possession and control. Second, ASCAP fails to point out that the Copyright Office did, in fact, order the objecting party to make its databases available for inspection and copying in that case. The same result is appropriate here.

Similarly, ASCAP's reliance on the Order in Docket No. 96-5 CARP DSTRA at 17-18 (November 27, 1996) is also misplaced. See ASCAP's Opposition at 8 n.4. Although a party need not produce documents to show an opposing party how it "did the math," the Copyright Office's decision in that case was based on the fact that the underlying figures at issue "[could] be already verified by the numbers in [the attachments]." Order in Docket No. 96-5 CARP DSTRA at 18. In this case, in contrast, the Public Broadcasters cannot

"do the math" and verify ASCAP's bottom-line figures based on figures found elsewhere in its direct case and Exhibits because no such documented underlying figures are provided.

Moreover, ASCAP's contention that it conducts this survey in the ordinary course of business and subject to oversight does not immunize it from producing the underlying data. For one thing, previous experience shows that ASCAP's survey methods are open to challenge. Indeed, in a conceptually similar rate court proceeding, the Second Circuit affirmed the trial court's finding that the ASCAP survey there proffered was "subject to methodological question." See ASCAP v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 571 (2d Cir. 1990).

In addition, numerous assertions by Dr. Boyle can only be reasonably verified by an examination of the underlying data. First, Dr. Boyle's analysis is based, in critical part, upon claims as to the number of hours included in the various surveys relied upon by ASCAP. However, the limited "credit" tables produced by ASCAP contain absolutely no information which would allow the Public Broadcasters to ascertain how many hours of programming are covered. ASCAP's analysis is also premised upon adjustments made to the "raw" data received by ASCAP, such as an adjustment based upon whether the music at issue

is a feature, theme or background use. It is the underlying cue and programming data, not simply tables consisting of credit subtotals, which should be produced in support of this type of analysis. Moreover, while ASCAP may claim to perform a random survey of public television broadcasters, the Public Broadcasters should also be entitled to understand which programs and stations were surveyed.

ASCAP further argues that it should be exempt from producing underlying data on grounds of burden. But such an argument, whatever its merit, should be given little weight where the data involved are so central to the proceeding and where both of the other parties have (with equivalent burden) made similar productions. We note, in any event, that ASCAP has conceded that the information sought is maintained in computerized form in the ordinary course of business. See ASCAP's Opposition at 2.

For the foregoing reasons, the Public Broadcasters' motion to compel production of the music use data underlying Dr. Boyle's testimony should be granted.

**Discovery Pertaining to the Testimony of
James Ledbetter**

ASCAP's reliance upon the privilege afforded to journalists in refusing to produce notes underlying Mr. Ledbetter's interviews misses the dispositive point of the Public Broadcasters' Motion. The issue here is not whether

the information sought is conditionally privileged;¹ rather, assuming arguendo a privilege could be asserted, it is plain that ASCAP's invocation of the privilege bars ASCAP from offering in evidence testimony based on documents and sources claimed to be shielded by the privilege. This is the clear purport of the cases cited in the Public Broadcasters' Motion at 12. ASCAP's efforts at distinguishing these cases fail. We are not dealing here with protecting the work-product of a disinterested third party, but, instead, of a witness sponsored by ASCAP as part of its direct case.

ASCAP accordingly should be required to either produce the refused information and disclose the source of the information or the portions of Mr. Ledbetter's testimony relating to such matters should be stricken.

**Discovery Pertaining to the Testimony of
Seth Saltzman**

In light of ASCAP's response clarifying the limited nature of Mr. Saltzman's proffer of data relating to overlapping musical compositions, the Public Broadcasters hereby limit their motion to compel to seek production of

1. We note, in this connection, that ASCAP's bald assertion of the journalistic privilege is unsupported by any evidentiary proffer concerning the circumstances in which the material was gathered, and the like. Lawyer argument is no substitute for such evidence. This shortcoming in itself warrants disregarding ASCAP's privilege-based objection.

the data underlying Mr. Saltzman's specific assertion that the 3,465 compositions listed at Exhibit 204 appeared on both public television and broadcast television stations and that the 2,039 compositions listed at Exhibit 203 appeared on both public television and commercial cable program services. Specifically, ASCAP should be compelled to produce data which verify that the songs cited by ASCAP were, in fact, used in programs on public television and broadcast television and cable program services, respectively (e.g., an identification of the specific programs on public television, commercial broadcast television, and commercial cable program services which underlie ASCAP's assertion that identical musical compositions were performed).

**Discovery Pertaining to the Testimony of
Ed Bergstein**

The Public Broadcasters seek production of documents underlying Mr. Bergstein's claim that the survey performed by Audits & Surveys Worldwide ("ASW") was "approved" by ASCAP. See the Public Broadcasters' Motion at 13-14. ASCAP concedes that it "has two documents in which its counsel gives legal comments on drafts of that questionnaire." See ASCAP's Opposition at 14. ASCAP refuses to produce these documents on the grounds that they are somehow privileged.

All of the federal court authority cited by ASCAP predates amendments to **Fed. R. Civ. P. 26**. See ASCAP's Opposition at 15. Since that time, many district courts have held that the 1993 amendments to **Fed. R. Civ. P. 26**, require the production of information considered by the expert which might otherwise be privileged. See, e.g., B.C.F. Oil Refining, Inc. v. Consolidated Edison Co., 171 F.R.D. 57, 63 (S.D.N.Y. 1997) (ordering production of "documents reviewed by plaintiff's expert which contain the mental impressions, opinions, and, in some cases, litigation strategies of plaintiffs [sic] attorneys"); Barna v. United States, No. 95 C 6552, 1997 WL 417847, at *2 (N.D. Ill. July 28, 1997) (under Rule 26, "any information considered by a testifying expert in forming his opinion on an issue, even if that information contains attorney opinion work product, is discoverable"); Karn v. Rand, 168 F.R.D. 633, 637 (N.D. Ind. 1996) ("it [is] plainly evident that the text of the new Rule, supported by its accompanying commentary, was designed to mandate full disclosure of those materials reviewed by an expert witness, regardless of whether they constitute opinion work product"). But see Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627 (E.D.N.Y. 1997).

The Copyright Office Order cited by ASCAP is inapposite. See ASCAP's Opposition at 15. The Public

Broadcasters are not asking ASCAP to produce "drafts of testimony, or document[s] analyzing or critiquing such drafts" (emphasis added). The Public Broadcasters seek documents relating to ASCAP's instructions to a testifying expert as to how to structure a survey. The two are clearly distinguishable, and the latter should be produced in response to a proper request.


ASCAP should not be able to offer its legal theories to its testifying expert for purposes of preparing testimony and then hide behind an unarticulated privilege to prevent the Public Broadcasters from discovering documents which clearly underlie the ASW survey.

For these reasons, ASCAP should be ordered to produce the documents they admit exist. ASCAP, in any event, should not be permitted to strike the compromising admission that the survey was "approved by the client" from page 5 of Mr. Bergstein's statement. See ASCAP's Opposition at 15 n.8.

Conclusion

For the foregoing reasons, as well as those set forth in their original motion, the Public Broadcasters move to compel production of underlying documents from ASCAP or, in the alternative, to strike the testimony for which underlying documents have been requested.

Respectfully submitted,



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